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August 31, 1994

David R. Siddall, Esquire
Legal Advisor to Commissioner Susan P. Ness
Federal Communications Commission
Room 826, Stop Code 0104
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation - GN Docket 93-252

Dear Mr. Siddall:

On behalf of the Law Firm and its 800 MHz Specialized Mobile Radio ("SMR") clients, I wish to thank you for taking the time to meet last Thursday with me and my colleague, M. Tamber Christian, to review our position on the matters previously set forth in our letter of August 18, 1994, to the Honorable Susan Ness.

As I explained during our meeting, this Law Firm represents several clients who, in good faith reliance on the Commission's long-standing rules, filed applications for 800 MHz SMR licenses. All of these applications were filed in the fall of 1993. The majority of the applicants are female-owned and controlled. Generally, the applicants are small enterprises attracted to the expanding opportunities in wireless communications.

This letter will address three matters raised during our meeting:

- Regulatory Parity: Although the provisions of the 1993 Budget Act require the Commission to regulate the conduct and operations of cellular telephone, PCS and SMR operators on a similar basis, *there is no requirement that those services be licensed in an identical manner.*

- July 26, 1993 Cut-off Date: This date applied to mutually exclusive applications to be selected by random selection, *not* to applications filed for authorization on a first-come, first served basis *without any expectation of mutual exclusivity.*

- Distinctions Among Pending SMR Applicants Will Only Delay Already Protracted Disposition Of Pending Applicants. To begin at this late date to distinguish between those SMR applicants who propose dispatch *vs.* commercial mobile services will only delay the disposition of many hundreds of pending applications. Plus it would make them "second class" licensees.

A. Regulatory Parity

The Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66 (the "*Budget Act*"), in addition to providing the Commission with authority to license certain radio services *for which*

there were mutually exclusive applications on the basis of competitive bidding, *see*, Letter to the Hon. Susan B. Ness, pp. 1-2, provided that all persons engaged in the provision of commercial mobile service be treated as common carriers. *Budget Act*, § 6002(b)(2)(A), 47 U.S.C. § 332(c)(1).

The *Budget Act* also required that the Commission enact such rules as were necessary for regulation of all commercial mobile services, including SMR, "to assure that licensees in such service are subjected to *technical* requirements that are comparable to the *technical* requirements that apply to licensees that are providers of substantially similar common carrier services." *Budget Act*, § 6002(d)(3)(B) (emphasis supplied).

Although it is plain that Congress intended that commercial mobile service providers be *regulated* on the same basis under Title II of the Communications Act of 1934, as amended (the "Act"), it does not therefrom follow that Congress intended that all such services be similarly licensed by competitive bidding.

There is no precedent that applications in services governed by similar provisions of the Act be *licensed* in an identical manner. For example, in the broadcast services, AM and TV applicants are subject to cut-off list selection. If there is no mutually exclusive filer by the cut-off deadline, then the AM or TV applicant is eligible for grant. FM radio applicants can only file during the opening of a relevant window; mutually exclusive applicants are subject to trial-type comparative hearing, with full cross-examination rights. 47 U.S.C. § 309(e). However, if there are no applicants during the relevant window, then the Commission will grant applications on a "first-come, first-served" basis.[1/] By contrast, LPTV applicants are subject to random selection lotteries. Yet a different selection regimen is employed for selection among mutually exclusive ITFS applicants, who are subject to "paper hearing" selection procedures. Nevertheless, the Commission regulates all these media services under the regulatory standards of Title III of the Act.

Moreover, as noted above, the *Budget Act* does not require regulatory equivalence in all respects among commercial mobile service providers. It allows the Commission to conclude that "differences in the regulatory treatment of some providers of commercial mobile services" are justified. See, House Rep. No. 213, 103d Cong., 1st Sess., August 4, 1993, at 491 ("Budget Act Conference Report"). Thus, Congress left the Commission free to conclude that some provisions of Title II of the Act would apply to some providers of commercial mobile services and not to others. Budget Act Conference Report, supra, at 490-491.[2/]

In the case of the pending SMR applicants, all of the Law Firm's client applicants filed in reliance upon the provisions of the Commission's Rules that provided for grant upon a first-

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1/ *See* Roger Wahl, 8 FCC Rcd 980 (1993).

2/ The *Budget Act* merely provides that all commercial mobile service providers be subject to "*technical* requirements that are comparable to the *technical* requirements that apply to licensees that are providers of substantially similar common carrier services." *Budget Act*, § 6002(d)(3)(B) (emphasis supplied). Nothing in the Budget Act Conference Report suggests that Congress intended to extend this provision governing technical requirements to a licensing regime. *See* Budget Act Conference Report, pp. 497-98.

come, first-served basis. As previously pointed out by the Law Firm, Letter to Hon. Susan Ness, p. 4, n. 2, returning those SMR applications or subjecting them to mutually exclusive applications after they obtained "cut-off" protection raises serious questions of arbitrary and capricious action. *See* McElroy Electronics Corporation v. F.C.C., 990 F.2d 1351 (D.C. Cir. 1993). Such a concern for the situation in which *pending* applicants find themselves influenced the Commission's decision to proceed with the selection of cellular mutually exclusive "unserved area" applicants by lottery.

Thus, it would appear that the Commissioners' concern that the *Budget Act* compels a shift to competitive bidding among *pending* SMR applicants is unfounded.

B. July 26, 1993 Cut-Off Date

Another concern that you raised during our meeting was the limitation of protection to pending applications from being changed to competitive bidding selection was that the *Budget Act* limited such protection to applications pending on July 26, 1993. Of course, our SMR clients filed their applications after that date.

Section 6002(e) of the *Budget Act* provides that the Commission is restricted from issuing any license or permit pursuant to Section 309(i) of the Act, *i.e.* by lottery.

The Law Firm does not believe that the July 26th reservation in the *Budget Act* applies to the SMR applicants because they filed as first-come, first-served applications, not as mutually exclusive applications to be selected by lottery.[3/] This interpretation is confirmed by the Budget Act Conference Report, wherein the *Budget Act* managers confirmed that the provision was intended in large measure to deal with the nine IVDS markets and certain other services for which applications were already on file at the time of the enactment of the *Budget Act* and were subject to lottery procedures.[4/]

C. Delay Attendant To Creating Distinctions Among Applicants

During our discussion, you raised the possibility of a carving-out from any changes in the processing rules of pending SMR applicants that would be proposing traditional dispatch service, which by definition is not common carrier service, and not require regulation as a commercial mobile service provider.

The delays that would be caused by requiring already limited resources in the Private Radio Bureau to examine each pending SMR application make this a practical impossibility.

3/ In the case of the IVDS applications, we have confirmed that the last of the three windows for the top 9 markets closed in September 1992. No markets that were subject to the July 28 and 29, 1994 auctions had been included in the top 9 IVDS markets.

4/ "This provision will permit the Commission to conduct lotteries for the nine [IVDS] markets for which applications have already been accepted, and several other licenses. This provision does not permit the FCC to conduct lotteries of applications that were not filed prior to July 26, 1993." Conference Report, pp. 498-99.

In our opinion, such a bifurcated approach to the pending SMR applicants at this late date would prove an administrative nightmare and waste of already taxed Private Radio Bureau resources in order to review the pending applications solely to determine whether they would be exempted from any change in the processing rules. Those resources would be better spent by completing the processing of the existing applicants and proceeding to grant of their authorizations.

In addition, this would unfairly restrict the legitimate uses to which these licenses might be put. Such a bifurcation would make the carved-out licenses, in a way, "second class," unable to take advantage of the authority available to other licensees on these frequencies. It would be, in our view, a device to do indirectly, that which the *Budget Act* and principles of administrative law prohibit the Commission from doing directly.

* * *

We urge the Commissioners to consider the problems they would create by any change in the processing rules for the first-come, first-served SMR applicants.

As we noted in our August 18th letter to Commissioner Ness, (1) the *Budget Act* specifically prohibits using auctions solely for expectations of revenues and encourages the Commission to avoid mutually exclusive application situations; (2) the retroactive application of new selection procedures to pending applicants would violate established principles of administrative law; and (3) the return or retroactive susceptibility to mutually exclusive applications would constitute a prohibited lack of notice to pending applicants.

The licensing of the pending SMR applicants is one of the Commission's last opportunities to provide small entrepeneurs the ability to compete, albeit on a small scale, with larger mobile service providers. It would disenfranchise many minority and female-owned applicants, people whom the *Budget Act* specifically intended to be helped by the Commission. The Commission must weigh these concerns and statutory duties carefullly.

In our opinion, the *Budget Act* does not compel the Commission to choose from among applicants in different mobile services in the same way. Moreover, the July 26, 1993 date has no significance for the 800 SMR applicants, nearly all of whom were <u>not</u> mutually exclusive in their applications.

We urge the Commission to continue the processing and grant of the pending 800 SMR applications.

Very truly yours,

BESOZZI, GAVIN & CRAVEN

By: _____
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